

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

FIDELITY AND GUARANTY INSURANCE	)	
COMPANY,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
KOCOLENE MARKETING CORPORATION!,	)	CAUSE NO. IP00-1106-C-T/?
	)	
Defendant.	)	

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

FIDELITY AND GUARANTY	)	
INSURANCE COMPANY,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
	)	IP 00-1106-C-T/K
vs.	)	
	)	
KOCOLENE MARKETING	)	
CORPORATION,	)	
	)	
Defendant/Counterclaim Plaintiff.	)	

**ENTRY ON MOTION FOR PARTIAL SUMMARY JUDGMENT, REQUEST FOR ORAL  
ARGUMENT, AND MOTION TO STRIKE<sup>1</sup>**

This case revolves around the meaning of “advertising injury” in a standard commercial general liability policy of insurance. This issue has become very common in litigation in recent years in both federal and state courts. There are no easy answers, and reasonable minds can differ, as demonstrated by the wealth of case law on the subject, some finding in favor of the insured and some in favor of the insurer. This court’s task in this case, however, is to predict how the Indiana Supreme Court would decide the issues if presented in the context in which it arises here. It is upon that task that the court now

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<sup>1</sup> This Entry is a matter of public record and is being made available to the public on the court’s web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

embarks in deciding the motion for partial summary judgment of Plaintiff/Counterclaim Defendant, Fidelity and Guaranty Insurance Company (“F&G”).

Kocolene requested oral argument to assist the court in deciding the summary judgment and related motion. Though the issues presented are not easy ones, and reasonable minds can differ, after reading the well-written briefs and doing independent research, the court considers oral argument unnecessary. Therefore, the request for oral argument is DENIED.

## **I. Summary Judgment Standard**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of material fact exists only if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact issue is material if it is outcome determinative under the governing substantive law. *Id.* at 248.

## **II. Undisputed Material Facts**

Kocolene is the named insured under a F&G commercial general liability insurance policy, in effect from October 1, 1998 to October 1, 1999 (the "Policy"). On March 5, 1999, Philip Morris Incorporated ("Philip Morris USA") filed a complaint against Kocolene, commencing *Philip Morris Inc. v. Allen Distributors, Inc., et al.*, Cause No. IP99-0281-C-B/S in the United States District Court, Southern District of Indiana (the "Philip Morris action" or "Philip Morris suit").

Kocolene contends that it defended and settled the Philip Morris lawsuit at its own expense because F&G refused to do so and that it is entitled under the Policy to be reimbursed by F&G for all amounts expended in the defense of the Philip Morris lawsuit.

The Policy provides in relevant part:

#### COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY

##### 1. Insuring Agreement.

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal injury" or "advertising injury" to which this coverage applies. We will have the right and duty to defend any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "advertising injury" to which this insurance does not apply. . . .

\* \* \*

- b. This insurance applies to:

\* \* \*

(2) "Advertising injury" caused by an offense committed in the course of advertising your goods, products or services. . .

##### 2. Exclusions.

This insurance does not apply to:

\* \* \*

- b. “Advertising injury” arising out of:

\* \* \*

(2) The failure of goods, products or services to conform with advertised quality or performance; . . .

\* \* \*

## SECTION V - DEFINITIONS

1. “Advertising injury” means injury arising out of one or more of the following offenses.
  - a. Oral or written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
  - b. Oral or written publication of material that violates a person’s right of privacy;
  - c. Misappropriation of advertising ideas or style of doing business; or
  - d. Infringement of copyright, title or slogan.

(Answer, Ex. A.)

In order to decide whether F&G had a duty to defend Kocolene in the Philip Morris lawsuit, the court must examine the factual allegations of the Philip Morris complaint. The complaint began by alleging generally:

This is an action for preliminary and permanent injunctive relief and damages for defendants’ willful acts of trademark infringement, false designation of origin, unfair competition, and trademark dilution, arising out of defendants’ diversion, distribution, and sale of MARLBORO® brand cigarettes that were previously designated for export and retail sale outside the United States. As described more fully below, these “gray goods” or “parallel imports” that are distributed and sold by defendants are materially different from the plaintiff’s domestically sold genuine MARLBORO® products. Defendants’ conduct has produced, and unless enjoined by this

Court, will continue to produce widespread consumer confusion and deception as well as irreparable injury to Philip Morris USA.

(Compl. ¶¶ 8-9 & Ex. A (“Philip Morris Complaint”) ¶ 1). The Philip Morris Complaint specifically alleged that Kocolene “sells, or assists in the sale, of re-entered MARLBORO® cigarettes through its retail convenience stores located in both Indiana and Kentucky.” (*Id.* ¶ 3(g).)

The Philip Morris Complaint made the following relevant factual allegations: Philip Morris USA manufactures for sale within the fifty United States tobacco products including MARLBORO® brand cigarettes. Philip Morris USA does not export that product. Philip Morris USA is a contract manufacturer of cigarettes for a related company, Philip Morris Products, Inc. (“PMP”), which distributes and sells its cigarettes for export (or to duty free shops). (*Id.* ¶ 2.) Philip Morris USA extensively advertises the MARLBORO® mark and its “roof” trademark. The vast majority of MARLBORO® advertising displays the “roof” design of the MARLBORO® packaging. (*Id.* ¶ 13.) Philip Morris’s MARLBORO® trademarks, including its “roof” design, have come to be recognized and relied upon by the trade and public to identify Philip Morris USA’s cigarettes and to distinguish them from the similar products of others. (*Id.* ¶ 15.)

In 1992 Philip Morris USA launched a continuity merchants redemption program which involved the acquisition and redemption of MARLBORO® “Miles” UPCs for merchandise. (*Id.* ¶ 16.) “Miles” have been available on all of Philip Morris USA’s genuine

domestic MARLBORO® products since the program was launched. The program rewards loyal smokers and promotes the goodwill associated with Philip Morris USA's trademarks. (*Id.* ¶¶ 8-9 & Ex. A ¶ 17.) The program is conducted only in the United States and only genuine MARLBORO® packs sold by Phillip Morris USA have the "Miles." (*Id.* ¶ 21.) Philip Morris USA's genuine domestic MARLBORO® packaging includes statutorily required warnings, "Miles" designations, statements against under age sale, an alphanumeric code indicating the date of manufacture, state tax stamps for packs sold in those states that require tax stamps, and does not include a designation "U.S. Tax Exempt For Use Outside U.S." (Compl. ¶¶ 23-24.)

The Philip Morris Complaint claimed that PMP owns the various MARLBORO® trademarks at issue in jurisdictions throughout the world except for the United States and sells its MARLBORO® cigarettes for export from the United States to foreign countries. (*Id.* ¶ 29.) Individual packs of MARLBORO® cigarettes sold by PMP for export have material differences from the individual packs sold by Philip Morris USA for United States consumption, including the absence of "Miles" UPCs and the required surgeon general warnings and the presence of the legend "U.S. Tax Exempt For Use Outside U.S." (*Id.* ¶ 31.).

The Philip Morris Complaint further alleged that the defendants, including Kocolene, engaged in the distribution and sale within the United States of PMP's MARLBORO® cigarettes designated for and intended to be exported to foreign countries. (*Id.* ¶ 32.) The

defendants were alleged to have adulterated the packaging of both the carton and individual packs of the re-entered MARLBORO® products by affixing shoddy paper or plastic stickers, fixing stickers to obscure any references to the fact that the product is designated for export use, re-wrapping the packages in an obvious and unattractive way, and affixing state tax stamps on the outside of the repackaged products. (*Id.* ¶¶ 8-9 & Ex. A ¶ 33.) The complaint alleged that numerous consumers were deceived into buying the defendants' re-imported MARLBORO® cigarettes and complained to Philip Morris USA that the cigarette packs did not include the expected "Miles." (Compl. ¶ 38.)

As its claims for relief, the Philip Morris Complaint alleged infringement of the registered MARLBORO® trademark in violation of section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1) (*id.* ¶¶ 46-47), infringement of the registered MARLBORO® "roof" package designs in violation of § 1114(1) (*id.* ¶¶ 48-49),<sup>2</sup> false designation of origin, false description, and false representation of source in violation of section 43(a) of the Lanham Act, § 1125(a) (*id.* ¶¶ 50-51), unlawful trade practices in violation of state law (*id.* ¶¶ 52-53), unfair competition under statutory and common law (*id.* ¶¶ 54-55), and dilution in violation of § 1125(c) (*id.* ¶¶ 56-57).<sup>3</sup> The relief sought included preliminary and

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<sup>2</sup> The court understands this to allege both trademark and trade dress infringement.

<sup>3</sup> As should be apparent to the parties from the recitation of undisputed facts, the court has in no way relied on either the affidavit of Gary F. Myers, including attachments and exhibits, or on the correspondence from Laina L. Heathman, of St. Paul Fire and Marine Insurance Company to Kim Schneider of Kocolene, dated April 13, 1999. Kocolene submits these materials in an effort to go beyond the allegations of the Philip Morris complaint, which would be improper under Indiana law, as discussed below. However, reliance on them is unnecessary and the court has disregarded them. Kocolene



permanent injunctive relief restraining the defendants from “using on or in connection with any product or service or the manufacture, importation, sale, offering for sale, distribution, advertising, promotion, labeling or packaging of any product or service” Philip Morris USA’s MARLBORO® trademark, MARLBORO® package design trademark, or any other confusingly similar packaging labeling or trade dress. (Compl. ¶¶ 8-9 & Ex. A at 21.) In addition, Philip Morris USA requested an order directing the defendants “to deliver up to Philip Morris USA . . . any and all merchandise, packaging, package inserts, labels, signs, prints, wrappers, receptacles, advertising or other materials which bear the infringing trademark and/or trade dress or any reproduction, copy or colorable imitation thereof.” (*Id.* at 23.)

### **III. Analysis**

Because this court is exercising diversity jurisdiction in this case, it must attempt to predict how the Indiana Supreme Court would decide the issues presented. *See, e.g., Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 925 (7<sup>th</sup> Cir. 2002). In the absence of a decision of the Indiana Supreme Court, the court may consider other persuasive authorities. *See Stephan v. Rocky Mountain Chocolate Factory, Inc.*, 129 F.3d 414, 417 (7<sup>th</sup> Cir. 1997). The Indiana Supreme Court has not addressed the

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also relies on the Myers affidavit to support its claim that it advertised the gray market cigarettes at the point of sale. (Statement of Additional Material Fact 34.) This is an effort to bring Kocolene’s conduct within the coverage of the Policy. But, as explained below, it is not what Kocolene actually did that matters, but rather, what the Philip Morris Complaint alleges in determining whether F&G had a duty to defend. Because the materials to which F&G objects have been disregarded, its motion to strike these materials is DENIED.

meaning of “advertising injury” provision in a CGL policy of insurance. Thus, the court relies on other persuasive authorities.

In the Policy, F&G assumed a duty to defend Kocolene for certain risks. It is well established under Indiana law that an insurer’s duty to defend is broader than its duty to indemnify. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991); *Gallant Ins. Co. v. Oswalt*, 762 N.E.2d 1254, 1259 (Ind. Ct. App. 2002); *Hoosier Ins. Co. v. Audiology Found.*, 745 N.E.2d 300, 306 (Ind. Ct. App. 2001), *trans. denied*. The duty to defend is determined solely by the nature of the underlying complaint. *Kopko*, 570 N.E.2d at 1285; *see also Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 302, 309 n.8 (7<sup>th</sup> Cir. 1998) (applying Indiana law).<sup>4</sup> In other words, “the allegations of the complaint, including the facts alleged, give rise to a duty to defend whenever, if proved true, coverage would attach.” *Federal Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 566 (7<sup>th</sup> Cir. 1997) (applying Indiana law). If recovery in the underlying suit is premised upon several theories

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<sup>4</sup> Kocolene argues that the *Kopko* standard for determining whether there is a duty to defend should not be followed, since a few state appellate court decisions have criticized the opinion. Kocolene cites to *Hoosier Insurance* for the proposition that “[a]s a matter of law, however, the insurer has a duty to conduct a reasonable investigation into the facts underlying the complaint before it may refuse to defend the complaint.” 745 N.E.2d at 306 (citing *Monroe Guaranty Ins. Co. v. Monroe*, 677 N.E.2d 620,624 (Ind. Ct. App. 1997), *trans. dismissed*). However, the Seventh Circuit in *Huntzinger*, expressly rejected *Monroe* in holding “that ‘the duty to defend is determined solely by the nature of the complaint,’ as opposed to the facts of the underlying suit.” 143 F.3d at 309 n.8 (quoting *Kopko*, 570 N.E.2d at 1285). Federal courts interpreting and applying Indiana law are bound by *Kopko*, an Indiana Supreme Court decision. *Id.* Thus, the court examines only the factual allegations in the Philip Morris Complaint to determine whether F&G had a duty to defend Kocolene.

of liability, some of which are not covered under the policy, the insurer has a duty to defend if just one theory falls within the policy's coverage. *Kopko*, 570 N.E.2d at 1285. Thus, in deciding whether F&G had a duty to defend Kocolene in the Philip Morris suit, the court considers the Philip Morris Complaint and the provisions of the Policy.

"The interpretation of an insurance policy is primarily a question of law for the court." *Gallant Ins. Co.*, 762 N.E.2d at 1262. Thus, matters of policy interpretation are particularly apt for summary judgment. Under Indiana law, "[t]he provisions of an insurance contract are subject to the same rules of interpretation and construction as are other contract terms." *Id.* If the insurance policy language is unambiguous, then "it should be given its plain and ordinary meaning." *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998). But if ambiguous, the language should be construed in favor of the insured and against the insurer. *Id.*; *Hoosier Ins. Co.*, 745 N.E.2d at 307. An insurance policy is ambiguous only if "susceptible to more than one interpretation and reasonable persons would honestly differ as to its meaning." *Gallant*, 762 N.E.2d at 1262. Indiana courts have concluded that differing interpretations of identical language in insurance policies by different courts is evidence of ambiguity in that language. See *Travelers Indem. Co. v. Summit Corp.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999); *Hartford Acc. & Indem. Co. v. Dana Corp.*, 690 N.E.2d 285, 295 (Ind. Ct. App. 1997).

#### **A. Burden of Proof**

Under Indiana law, the insured bears the initial burden of demonstrating that the nature of the underlying claim is covered by the policy at issue. See *Huntzinger*, 143 F.3d at 308 (citing *Kopko*, 570 N.E.2d at 1285). The insurer, however, bears the burden of proving that an exclusion applies. *Hoosier Ins. Co.*, 745 N.E.2d at 309. The parties dispute whether the provision stating that an advertising injury must be caused “in the course of advertising” is a coverage provision or an exclusion provision. The starting point is the Policy language, which provides in pertinent part: “(a) We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . ‘advertising injury’ to which this insurance applies. . . . However, we will have no duty to defend the insured against any ‘suit’ seeking damages for . . . ‘advertising injury’ to which this insurance does not apply.” Following paragraph (a), paragraph (b) provides that: “This insurance applies to: . . . ‘Advertising Injury’ caused by an offense committed in the course of advertising your goods, products or services. . . .” F&G contends that Kocolene bears the burden of proving coverage under this language. Kocolene, on the other hand, argues that the language is a limitation on which F&G bears the burden.

The Seventh Circuit considered the burden of proof with respect to a substantially similar contract provision in *Erie Insurance Group v. Sear Corp.*, 102 F.3d 889 (7<sup>th</sup> Cir. 1996). The policy at issue there provided:

*Advertising Injury Liability--Coverage H*

We will pay for damages because of advertising injury for which the law holds anyone responsible and which are covered by your policy. We cover only advertising injury caused by an offense committed during the policy

period *and in the course of advertising your goods, products or services* and which takes place in the covered territory.

*Id.* at 893 (emphasis in *Erie Ins.*). The insured, Sear, argued that the italicized language was a limitation on the coverage provided in the first sentence, such that the insurer, Erie Insurance, had the burden of proof. Erie Insurance argued that the language was not an exclusion but part of the definition of coverage. *Id.* The Seventh Circuit agreed with the insurer, concluding that the advertising injury provision defined coverage, thus placing the burden on the insured to prove coverage. *Id.* The court reasoned that:

the limiting language in the Erie policy is not hidden away in a complex litany of exceptions to general coverage. Instead, the Erie policy's "in the course of advertising" language is easily found in the advertising injury coverage provision, and serves to define the scope and purpose of that provision's coverage.

*Id.*

The "in the course of advertising" language in the F&G Policy is the same in all relevant respects as the language in the policy at issue in *Erie Insurance*. Even though the provision in paragraph (b) may literally limit the coverage set out in paragraph (a), the court concludes that it is not an exclusion, but part of the definition of coverage. The "in the course of advertising" language in F&G's Policy is not hidden away in a complex litany of exceptions to general coverage, but rather, is easily found in the advertising injury coverage provision and serves to define the scope of that provision's coverage. Paragraphs (a) and (b) must be read together to determine when coverage is provided. Furthermore, the policy contains explicit exclusions from Coverage B in subsection 2 entitled "Exclusions." This subsection excludes, for instance, advertising injuries that arise

out of a “failure of goods, products or services to conform with the advertised quality or performance. . . .” Given the existence of this specific subsection listing exclusions, the most reasonable interpretation of the “in the course of advertising” language is that it is not an exclusion. Thus, the court finds that Kocolene has the burden to show that the Philip Morris Complaint alleges an advertising injury caused by an offense committed in the course of advertising its goods, products or services.

## **B. “Advertising Injury”**

The first issue is whether Kocolene can carry its burden of showing that the Philip Morris Complaint alleges an “advertising injury.” The Philip Morris Complaint’s allegations include trademark infringement, false designation of origin, unfair competition, and trademark dilution in violation of the Lanham Act. “Advertising injury” is defined in the Policy as meaning “injury arising out of one or more of [four enumerated] offenses[.]” Kocolene maintains that Philip Morris USA’s claims for trademark and trade dress infringement are covered under the “advertising injury” provision because they constitute the offenses of “misappropriation of advertising ideas or style of doing business” and “infringement of copyright, title or slogan”. F&G argues that the underlying claims are not covered under the Policy because trademark and trade dress infringement nowhere appear in the policy definition of “advertising injury.” The Policy does not define “misappropriation of advertising ideas or style of doing business” or “infringement of copyright, title or slogan,” so the court must look beyond the Policy to determine what these phrases mean.

One Indiana court and one federal court applying Indiana law have addressed CGL policy “advertising injury” provisions identical in all relevant respects to the “advertising injury” provision at issue in this case. See *Heritage Mutual Insurance Co. v. Advanced Polymer Technology, Inc.*, 97 F. Supp. 2d 913 (S.D. Ind. 2000), and *Hoosier Insurance Co. v. Audiology Foundation*, 745 N.E.2d 300 (Ind. Ct. App. 2001). The insured in *Heritage Mutual* sought coverage under an advertising injury provision for underlying

claims of patent infringement, unfair competition, and false designation of origin, arguing these claims potentially came within the “infringement of title” offense. 97 F. Supp. 2d at 917, 919, 921. Judge Barker concluded that the underlying claims for patent infringement were not covered under the “infringement of title” offense. *Id.* at 922-25. The insured also sought coverage under the “misappropriation of advertising ideas or style of doing business” offense. *Id.* at 925. The court observed that some courts had defined the term “misappropriation” “narrowly and technically to track the common-law tort of misappropriation,” *id.* at 926 (citing *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795, 802 (6<sup>th</sup> Cir. 1996)), whereas, other courts had defined the term more generally to mean “to take wrongfully.” *Id.* (citing, e.g., *Winklevoss Consultants, Inc. v. Fed. Ins. Co.*, 991 F. Supp. 1024, 1037-38 (N.D. Ill. 1998)). Judge Barker adopted the broader definition, and concluded that “misappropriation of advertising ideas” meant that “the insured wrongfully took an idea about the solicitation of business.” *Id.* (citations omitted).<sup>5</sup> Judge Barker concluded that this definition did not cover patent infringement and unfair competition, based in part on the absence of even a hint in the underlying complaint that the insured wrongfully took any idea about how to solicit business or advertise. *Id.* at 926-27. As for the “misappropriation of style of doing business,” Judge Barker concluded, like the majority of courts, that phrase means a “company’s comprehensive manner of operating its business.” *Id.* at 928. In doing so, she noted that most courts have equated

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<sup>5</sup> The Seventh Circuit had defined “advertising” to mean the “active solicitation of business” and involving “actual, affirmative self-promotion of the actor’s goods or services.” *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 894 (7<sup>th</sup> Cir. 1996).



the phrase to trade dress infringement. *Id.* Judge Barker concluded that none of the underlying allegations came within the definition of “misappropriation of style of doing business,” noting that the insured did not seek coverage for trademark or trade dress infringement claims. *Id.* at 929.

In *Hoosier Insurance*, the insured argued that the underlying claims for false advertising, false designation of origin and unfair competition in violation of the Lanham Act and Maryland law came within the “misappropriation of style of doing business” provision. The insured did not argue that the claims came within the “misappropriation of advertising idea” provision. 745 N.E.2d at 304, 307 n.5. The court adopted the *Advanced Polymer* definition of “misappropriation of style of doing business” and concluded that the insured was covered under this provision because the insured association and the association that sued the insured both were professional associations that issued credentials to audiologists, and one company was “an upstart,” created years after the other. *Id.* at 307-08. Having decided that the underlying claims were covered under “misappropriation of style of doing business,” the court did not consider whether the claims were covered under any other part of the “advertising injury” definition.

Decisions addressing the coverage of trademark and trade dress infringement claims under an “advertising injury” provision offer guidance to the court since these are some of the claims alleged in the Philip Morris Complaint. As Judge Barker observed in *Advanced Polymer*, the majority of courts that have considered the issue have held that

trademark and trade dress infringement are covered under the “misappropriation of advertising ideas or style of doing business” phrase of the “advertising injury” provision in standard CGL policies. See, e.g., *Adolfo House Distrib. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1339-40 (S.D. Fla. 2001); *CAT Internet Sys. v. Providence Wash. Ins. Co.*, 153 F. Supp. 2d 755, 762 (E.D. Pa. 2001); *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 617 (S.D. Tex. 1999); *Am. Employers’ Ins. Co. v. DeLorme Pub. Co.*, 39 F. Supp. 2d 64, 73, 75-77 (D. Me. 1999); *Gemmy Indus. Corp. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698, at \*3 (N.D. Tex. Nov. 17, 1998); *Indus. Molding v. Am. Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 638 (N.D. Tex.), *vacated on request upon settlement*, 22 F. Supp. 2d 569 (N.D. Tex. 1998); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Mass. Bay Inc.*, 818 F. Supp. 553, 558 (W.D.N.Y. 1993), *vacated at attorneys’ request*, 153 F.R.D. 36 (W.D.N.Y. 1994); *Poof Toy Prods. v. U.S. Fid. & Guar. Co.*, 891 F. Supp. 1228, 1232-33 (E.D. Mich. 1985); *cf. Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 194 F.3d 742, 749 (3<sup>rd</sup> Cir. 1999) (suggesting without deciding that trademark infringement is covered under the standard advertising injury provision); *but see Callas Enter., Inc. v. Travelers Indem. Co.*, 193 F.3d 952, 956-57 (8<sup>th</sup> Cir. 1999) (holding trademark infringement not “misappropriation of advertising ideas or style of doing business, following *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795 (6<sup>th</sup> Cir. 1996)).

The *J.A. Brundage* court said that the ordinary meaning of the phrase “misappropriation of advertising ideas” meant “the wrongful taking of the manner by which another advertises its goods or services. 818 F. Supp. at 557. This definition is quite similar to that given the phrase in *Heritage Mutual*, see 97 F. Supp. 2d at 926 (defining “misappropriation of advertising ideas” as “the insured wrongfully took an idea about the solicitation of business”). The *J.A. Brundage* court concluded, albeit with little analysis, that trademark and trade name infringement were included in that definition. *Id.* The court reasoned that the Lanham Act defines “trademark” as “any word, name, symbol or device or any combination thereof” used to identify and distinguish one’s goods from those manufactured or sold by others. *Id.* (quoting 15 U.S.C. § 1127). The court also concluded that “misappropriation of style of doing business” included trademark and trade name infringement. It explained that “one’s mark and name is an integral part of an entity’s ‘style of doing business.’” *Id.* Indeed, some courts equate “style of doing business” with “trade dress.” See, e.g., *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F. Supp. 583, 585 (E.D. Va. 1993) (“‘Style of doing business’ expresses essentially the same concept as the more widely used term: ‘trade dress.’”) (citation omitted).

It is worth noting that prior to 1986, the standard CGL form included “unfair competition” as an enumerated advertising injury and expressly excluded trademark, trade name and service mark injuries from coverage. See *Bay Elec. Supply*, 61 F. Supp. 2d at 617. In 1986, however, the standardized CGL form was revised by eliminating “unfair competition” and adding “misappropriation of advertising ideas and style of doing

business” and eliminating the exclusion for trademark, trade name and service mark. The undersigned agrees that this revision arguably suggests that coverage would be provided for trademark, trade name, and service mark claims as advertising injuries. See *id.*; but see *Advance Watch*, 99 F.3d 805 (indicating that the exclusion for trademark infringement became unnecessary with the elimination of coverage for unfair competition).

Furthermore, the packaging of the cigarettes identify them as Philip Morris USA cigarettes and distinguish them from the products of others. In this court’s opinion, the packaging, including the roof design, of the cigarettes arguably could be considered an “advertising idea”. See *Adolfo House Distrib.*, 165 F. Supp. 2d at 1339 (“one reasonable interpretation of “advertising ideas” . . . is that [it] encompass[es] the physical appearance of a product”); *Bay Elec. Supply*, 61 F. Supp. at 615-16 (accepting similar position by insured). The design of the packaging arguably is an idea about the solicitation of business. And, according to the Philip Morris Complaint, Kocolene’s repackaging of the gray market cigarettes deceived numerous customers into buying those cigarettes. In other words, the repackaging caused those customers to buy the gray market cigarettes by creating the impression that they were domestic MARLBORO® products.

In arguing that trademark and trade dress infringement do not constitute “advertising injury,” F&G relies on *Advance Watch Co. v. Kemper Nat’l Ins. Co.*, 99 F.3d 795 (6<sup>th</sup> Cir. 1996) (applying Michigan law), where the court held that “misappropriation of advertising ideas or style of doing business” did not encompass trademark or trade dress

infringement claims. *Id.* at 802, 804. The court reasoned that the term “advertising” was limited to verbal conduct and also relied on the absence of the word “trademark” in the policy definition of “advertising injury.” *Id.* at 802-03. *Advance Watch* is a minority view and is unpersuasive. The determination that “advertising” is limited to verbal conduct ignores the reality of today’s commercial world and is unreasonable. In addition, the absence of the word “trademark” in the CGL policy at issue in *Charter Oak Fire Insurance Co. v. Hedeem & Cos.*, 280 F.3d 730, 736 (7<sup>th</sup> Cir. 2002), discussed below, did not prevent the Seventh Circuit from concluding that trademark infringement was covered under the “advertising injury” provision of a standard CGL policy. And, the *Advance Watch* analysis conflicts with Indiana’s rules of contract interpretation that ambiguous terms be construed in favor of coverage. For these reasons, the court does not find the *Advance Watch* decision persuasive.

F&G’s Policy does not define the phrase “misappropriation of advertising ideas or style of doing business”. The divergence in case law regarding the meaning of this phrase indicates that it is ambiguous. *See, e.g., Travelers Indem. Co. v. Summit Corp.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999). Interpreting the phrase “misappropriation of advertising ideas and style of doing business” to include claims for trademark and trade dress infringement is a reasonable interpretation, finds support in the majority of decisions considering the issue, comports with an insured’s reasonable expectations, and favors the insured. Therefore, the court concludes that the trademark and trade dress infringement

claims arguably constitute advertising injury under the offense of “misappropriation of advertising ideas or style of doing business”.

The court also concludes that the trademark and trade dress infringement claims arguably fall under the “infringement of title” offense in the “advertising injury” provision. In *Charter Oak Fire Insurance Co.*, Charter Oak, the insurer, sought a declaratory judgment against its insureds that it owed no duty to defend them for underlying claims, including trademark infringement. At issue was an “advertising injury” provision in a CGL policy, alike in all relevant respects to the one in the instant case. *Charter Oak Fire Ins. Co.*, 280 F.3d at 735. Charter Oak argued that trademark infringement was not covered as an “advertising injury” because the policy failed to expressly include trademark infringement, and the inclusion of copyright infringement indicated that trademark infringement was not included. *Id.* at 735-36. The court rejected this argument and reasoned that the policy also referred to “infringement of . . . title or slogan,” which was not a distinct intellectual property offense. *Id.* at 736. The Seventh Circuit, applying Wisconsin law, concluded that trademark infringement claims came within the policy’s coverage under the “infringement of title” provision. *Id.* The court explained that “infringement” meant “using someone else’s words, so that ‘title’ refers to names and related trademarks. . . .” *Id.* Another panel of the Seventh Circuit reached the same conclusion when interpreting an identical “infringement of title” provision in *Zurich Insurance Co. v. Amcor Sunclipse North America*, 241 F.3d 605, 608 (7<sup>th</sup> Cir. 2001) (applying California law).

Thus, decisions of the Seventh Circuit support the conclusion that Philip Morris USA's claims for trademark, as well as trade dress, infringement arguably are covered by the Policy under the "infringement of title" offense of the "advertising injury" provision. Numerous other courts have concluded that a trademark or trade dress infringement claim comes within the offense of "infringement of copyright, title or slogan" in the "advertising injury" definition of the standard CGL form policy. See, e.g., *Am. Employers' Ins. Co. v. DeLorme Pub. Co.*, 39 F. Supp. 2d 64, 77 (D. Me. 1999); *Poof Toy Prods.*, 891 F. Supp. at 1234; *P.J. Noyes Co. v. Am. Motorists Ins. Co.*, 855 F. Supp. 492, 494-95 (D.N.H. 1994); *J.A. Brundage*, 818 F. Supp. at 558-59; *First State Ins. Co. v. Alpha Delta Phi Fraternity*, No. 1-94-1050, 1995 WL 901452, at \*12 (Ill. Ct. App. Nov. 3, 1995).

Further, the conclusion that trademark comes within the meaning of the word "title" is supported by the plain, ordinary meaning of the word "title." Black's Law Dictionary defines "title" as a "mark, style or designation; a distinctive appellation; the name by which anything is known." *Black's Law Dictionary* 1485 (6<sup>th</sup> ed. 1990). A "mark" is expressly included within this definition of "title"; thus, by definition, a trademark may be covered under the "infringement of title" language of the "advertising injury" provision in the F&G Policy.

F&G argues that had the parties intended to provide coverage for trademark or trade dress infringement claims under the "infringement of" phrase, then such claims would have been expressly enumerated in the phrase. This argument is unpersuasive. Though

some cases such as *Advance Watch and ShoLodge, Inc. v. Travelers Indemnity Co.*, 168 F.3d 256, 259-60 (6<sup>th</sup> Cir. 1999), have relied on the lack of express inclusion of trademark and trade dress claims in finding no coverage, this lack of inclusion did not deter the Seventh Circuit from concluding that such claims came within the “infringement of title” provision in *Charter Oak*. This conclusion is in accord with that reached by other courts. See, e.g., *DeLorme Pub. Co.*, 39 F. Supp. 2d at 78. Decisions such as *Advance Watch* and *ShoLodge* are not persuasive when viewed against the authority of *Charter Oak*, which in this court’s view is better reasoned, consonant with the way in which insurance policies are construed under Indiana law and the dictionary definition of “title,” as well as in accord with the majority of cases considering the issue.

F&G also contends that there is no coverage where the underlying complaint alleges harm to consumers only and not to competitors, citing a case out of the court of appeals of Ohio. Even if the court accepts this proposition as correct under Indiana law, it does not help F&G. Philip Morris USA’s Complaint alleges not only consumer confusion but also harm to Philip Morris USA.

Under Indiana law, the divergence of case law regarding whether trademark and trade dress infringement comes within the “infringement of title” offense in standard CGL advertising injury provisions is indicative that the language is ambiguous, see *Travelers Indem. Co. v. Summit Corp.*, 715 N.E.2d 926, 936 (Ind. Ct. App. 1999), and ambiguous policy language must be construed against F&G, see *Meridian Mut. Ins. Co. v. Auto-*



*Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998). Thus, the court concludes that Philip Morris USA's claims for trademark and trade dress infringement arguably come within the Policy definition of "advertising injury" under the "infringement of title" offense. Because Kocolene can demonstrate an alleged advertising injury, the court must consider whether Kocolene can show that the alleged advertising injury was caused by an offense committed in the course of advertising its goods, products or services.

### **C. "In The Course Of Advertising"**

The Policy does not define "advertising". F&G maintains that Kocolene's sale of goods with infringing marks does not constitute "advertising" and that the alleged injury was not caused by advertising.

Seventh Circuit decisions have addressed the meaning of "advertising" in "advertising injury" provisions in CGL policies. In *Erie Insurance*, the insurer brought a declaratory judgment action against its insured. The issue was whether the insured's alleged defamation of another occurred "in the course of advertising" the insured's goods, products, or services. *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 892 (7<sup>th</sup> Cir. 1996). The term "advertising" was not defined in the policy at issue, so the court gave it its plain, ordinary meaning. *Id.* at 895. The court determined that actions taken "in the course of advertising" involve the "active solicitation of business" and the "actual, affirmative self-promotion of the actor's goods or services." *Id.* at 894; *see also Zurich Ins. Co. v. Amcor Sunclipse N. Am.*, 241 F.3d 605, 607 (7<sup>th</sup> Cir. 2001) (addressing an "advertising injury"

provision under California law and stating that “[a]dvertising . . . refers to dissemination of prefabricated promotional material”); *Playboy Enter., Inc. v. St. Paul Fire & Marine Ins.*, 769 F.2d 425, 429 (7<sup>th</sup> Cir. 1985) (applying Illinois law and defining “advertising” as referring to “the widespread distribution of promotional material to the public at large”).

One district judge in the Seventh Circuit has indicated that trademark and trade dress infringement claims are not excluded from the more restrictive definition of “advertising” used in *Playboy*:

The widespread distribution definition contains no requirement that the thing that draws attention to the product be separate from the product. A number of courts have found that passing off, trademark, trade name or trade dress infringement claims implicitly involve advertising activity, because such claims necessarily involve advertising or use of the mark to identify the insured’s goods or services to a substantial number of people.

*Flodine v. State Farm Ins. Co.*, 99 C 7466, 2001 WL 204786, at \*10 (N.D. Ill. Mar. 1, 2001) (concluding that attaching tags to products to be distributed and displayed in stores was an advertising activity); accord *Adolfo House*, 165 F. Supp. 2d at 1339. In addition, it is noted that the court in *Playboy* was construing “advertising” in an exclusion provision rather than a coverage provision, and courts construe exclusionary provisions against the drafter, the insurer, and view them more narrowly than coverage provisions. See *Winklevoss Consultants, Inc. v. Fed. Ins. Co.*, 991 F. Supp. 1024, 1032 n.9 (N.D. Ill. 1998). Thus, it is reasonable to conclude the broader and more general definition of the

word “advertising” should be applied here where the court is considering a coverage provision.

Because unambiguous terms should be given their plain and ordinary meanings under Indiana law, consideration of the dictionary definition of the term “advertising” is helpful. Black’s Law Dictionary defines “advertise” as follows:

To advise, announce, apprise, command, give notice of, inform, make know, publish. To call a matter to the public attention by any means whatsoever. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation because of enumeration, statements and representations made in a newspaper or other publication or on radio or television or contained in any notice, handbill, sign, catalog, or letter, or printed on or contained in *any tag or label attached to or accompanying any merchandise*. As distinguished from other forms of communication means to call a matter to the public attention.

*Black’s Law Dictionary* 54 (6<sup>th</sup> ed. 1990) (emphasis added). This definition encompass the labels on and packaging of a product such as cigarettes. Other courts have concluded that a product’s label and packaging might be considered “advertising” under a broad definition of the term. See *Adolfo House Distrib. v. Travelers Prop. & Cas. Ins. Co.*, 165 F. Supp. 2d 1332, 1339 (S.D. Fla. 2001); *Flodine*, 2001 WL 204786, at \*10.

The court finds that a broad definition of the term “advertising” arguably encompasses Kocolene’s activities as alleged in the Philip Morris Complaint. The packaging, specifically including the MARLBORO® and roof trademarks and trade dress were a form of advertising, that is, they “functioned as mini-ads that were tied to the

products, clearly promotional in nature yet distinct from the products themselves.” *Flodine*, 2001 WL 204786, at \*10. The repackaging was an active means by which Kocolene promoted the gray market cigarettes to consumers and sought their business. The complaint also alleges that the display of the cigarettes caused consumer confusion, suggestive of some form of advertising. In addition, the language “assists in the sale” in the Philip Morris Complaint could be understood as referring, though vaguely, to advertising.

Kocolene must show a causal connection between the advertising injury its advertising activities. See, e.g., *Poof Toy Prods., Inc. v. U.S. Fid. & Guar. Co.*, 891 F. Supp. 1228, 1234-35 (E.D. Mich. 1995). Without this requirement, “almost every claim related to a insured’s business would be covered by the advertising injury clause since almost every product or service offered is subject to at least some form of advertising.” *Id.* Since the court has determined that the Philip Morris Complaint arguably alleges that Kocolene engaged in advertising, the conclusion that the advertising caused the alleged advertising injury is almost foregone.

The Philip Morris Complaint alleges claims for infringement of trademark and package designs, false designation of origin, false description, and false representation in violation of sections 32(1) and 43(a) of the Lanham Act. Section 32(1) of the Lanham Act prohibits any person without the consent of the registrant from using in commerce “any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in

connection with which such use is likely to cause confusion, or to cause mistake, or to deceive[.]” 15 U.S.C. § 1114(1). Section 43(a) of the Lanham Act prohibits the use in commerce of “any word, term, name, symbol, or device, or any combination thereof . . . which--is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person[.]” 15 U.S.C. § 1125(a)(1)(A). The Supreme Court has said that the protection of trademarks and trade dress serves to “secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992). Thus, many courts have concluded that a claim under the Lanham Act requires a party to prove that the infringing mark was used to identify the goods or services to the public in a manner which was likely to cause consumer confusion as to the manufacturer of the goods. See, e.g., *Am. Employers’ Ins. Co. v. DeLorme Pub. Co.*, 39 F. Supp. 2d 64, 74 (D. Me. 1999); *Gemmy Indus. Corp. v. Alliance Gen. Ins. Co.*, No. 3-98-CV-0014-BD, 1998 WL 804698, at \*3 (N.D. Tex. Nov. 17, 1998); *J.A. Brundage Plumbing & Roto-Rooter, Inc. v. Mass. Bay Inc.*, 818 F. Supp. 553, 558 (W.D.N.Y. 1993), *vacated at attorneys’ request*, 153 F.R.D. 36 (W.D.N.Y. 1994) (“it is not possible to allege a claim for trademark, servicemark or trade name infringement without the infringing mark being used to identify the goods or services to the public”).

Courts have said of claims for trademark and trade dress infringement and false designation of origin under the Lanham Act that “[s]uch claims inherently and necessarily implicate advertising activities.” *Gemmy Indus. Corp.*, 1998 WL 804698, at \*3; *Poof Toy Prods.*, 891 F. Supp. at 1235-36 (“allegations of trademark and trade dress infringement inherently involve advertising activity. In other words, there can be no trademark/trade dress infringement without advertising having occurred.”). Courts have observed that under the broad definition of the term “advertise,” “it is impossible to allege a Lanham Act claim ‘without the infringing mark being used to identify the goods or services to the public.’” *Gemmy Indus. Corp.*, 1998 WL 804698, at \*3 (quoting *J.A. Brundage*, 818 F. Supp. at 558). And, the Seventh Circuit has remarked that “[a] trade mark is but a species of advertising. . . .” *Northam Warren Corp. v. Univ. Cosmetic Co.*, 18 F.2d 774, 774 (7<sup>th</sup> Cir. 1927). The rationale for the conclusion that allegations of trademark and trade dress infringement inherently involve advertising activity has been explained as follows:

This conclusion results from a required element in every trademark/trade dress case, that the mark or dress is likely to cause confusion to the consumer or deceive the consumer as to the origin or manufacturer of the goods. . . . To have (or potentially cause) this effect, one must clearly advertise (announce to the intended customers) the mark or dress. . . .

“Trademark or tradename infringement, in contrast [to patent or copyright infringement], necessarily involves advertising, or use, of the mark or name to identify the merchants's goods or services. Thus, where it is possible to state a claim for patent infringement or copyright infringement without necessarily alleging that such activities occurred in advertising one's goods, it is not possible to allege a claim for trademark, servicemark or trade name infringement without the infringing mark being used to identify the goods or services to the public.”

*Poof Toy Prods.*, 891 F. Supp. at 1236 (quoting *J.A. Brundage*, 818 F. Supp. at 553).

This rationale also applies to trade dress infringement claims. *Id.*

F&G contends that the injuries alleged in the underlying complaint were caused by Kocolene's purchase, importation and sale of gray cigarettes rather than by advertising. F&G principally relies on the decision in *Diversified Investments Corp. v. Regent Ins. Co.*, No. 98-2461, 1999 Wis. App. LEXIS 399, at \*4-15 (Wis. Ct. App. Apr. 8, 1999) (unpublished decision), which in turn, relied on *Advance Watch*. The court has explained why it finds the decision in *Advance Watch* unpersuasive. *Diversified Investments* is therefore likewise unpersuasive. In addition, in *Diversified Investments*, the underlying action was based on the insured's manufacture of bikes that looked like and had the same name as the bikes manufactured by the underlying plaintiff, not on the insured's advertising of the bikes. 1999 Wis. App. LEXIS 399, at \*11. Similarly, the underlying complaints in *Alpina USA Eyewear* and *GAF Sales and Service* did not allege injury arising from the insured's advertising. *Alpina USA Eyewear, L.L.C. v. Reliance Ins. Co.*, No. 96-55388, 1997 U.S. App. LEXIS 22912, at \*7 (9<sup>th</sup> Cir. Aug. 27, 1997) (unpublished decision); *GAF Sales & Serv., Inc. v. Hastings Mut. Ins. Co.*, 568 N.W.2d 165, 168 (Mich. Ct. App. 1997).

F&G argues that *Western States Ins. Co. v. Wisconsin Wholesale Tire, Inc.*, 184 F.3d 699 (7<sup>th</sup> Cir. 1998) and *Tri-Clover, Inc. v. DSO Sanitary Supply Co.*, Nos. 97-C-1290, 98-C-0496, 2000 U.S. Dist. LEXIS 9981 (E.D. Wis. Mar. 31, 2000), relied on

*Diversified Investments*, thus suggesting that this court, too, should rely on *Diversified Investments*. *Western States* cited *Diversified Investments* to show that Wisconsin cases give “advertising injury” clauses their ordinary meaning and noted that the the plaintiff’s alleged harm in *Diversified Investments* arose from the infringing product design rather than any advertising. *Id.* at 702-03. The *Western States* court rejected the argument that a salesman’s acts in calling on customers was “in the course of advertising.” *Western States*, 184 F.3d at 702. *Tri-Clover* cited *Diversified Investments* in support of the causation requirement. That case is inapposite to the instant case as the underlying claims were patent infringement and misappropriation of trade secrets and confidential information, 2000 U.S. Dist. LEXIS 9981 at \*26-27, claims which do not inherently involve advertising.

The decision in *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 749 (3<sup>rd</sup> Cir. 1999), suggests a useful approach to the causation requirement. The court recommended that causation be found where “the injury [is] complete in the advertisement, requiring no further conduct[.]” *Id.* at 750 n.8 (citations omitted). Here, the alleged injury was complete in the covered offenses of trademark and trade dress infringement, and no further conduct was required. *Cf. P.J. Noyes Co. v. Am. Motorists Ins. Co.*, 855 F. Supp. 492, 495 (D.N.H. 1994) (“But for the use of the term in the packaging, literature and advertisements, there would have been no trademark infringement.”). In addition, it is alleged that Kocolene “adulterated the packaging of both the carton and individual packs of” the gray market cigarettes and thus deceived consumers into buying those cigarettes.



These allegations reveal a connection between the alleged injury and Kocolene's arguably advertising activities-- the repackaging, labeling and use of the MARLBORO® and roof trademarks and trade dress.

Furthermore, the relief sought in the underlying complaint is indicative of a causal connection between the alleged injury and Kocolene's advertising activities. *See Molding v. Am. Mfrs. Mut. Ins. Co.*, 17 F. Supp. 2d 633, 638 (N.D. Tex.), *vacated on request upon settlement*, 22 F. Supp. 2d 569, 640 & n.1 (N.D. Tex. 1998) (finding causal connection where underlying complaint alleged misappropriation of trade dress and sought to enjoin insured from using the product at issue in advertising); *Ben Berger & Son, Inc. v. Am. Motorist Ins. Co.*, No. 94 CIV 3250 (DC), 1995 WL 386560, at \*4 n.4 (S.D.N.Y. June 29, 1995) (concluding there was a causal connection between advertising and trade dress infringement claims, noting that the underlying complaint asked for an injunction requiring the destruction of all copies of advertisements depicting the infringing items). The Philip Morris Complaint seeks to enjoin Kocolene from using in, among other things, advertising the MARLBORO® and package design trademark or other confusingly similar packaging, labeling or trade dress. Thus, the court concludes that the injury alleged in the Philip Morris Complaint arguably was caused by an offense committed in the course of Kocolene's advertising of its goods, products or services.

Kocolene can carry its burden of demonstrating that the nature of at least some of the underlying claims in the Philip Morris suit arguably are covered by the F&G Policy.

Therefore, Kocolene can show that F&G had a duty to defend it in that action, barring the applicability of an exclusionary provision in the Policy. The parties have not addressed whether any exclusionary provision would apply, though F&G hinted that one might be applicable. Accordingly, the court finds that F&G's motion for partial summary judgment should be denied.

#### **IV. Conclusion**

For the foregoing reasons, the court finds that F&G's motion for partial summary judgment should be DENIED, the request for oral argument should be DENIED, and the motion to strike should be denied.

ALL OF WHICH IS ORDERED this 26th day of March 2002.

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John Daniel Tinder, Judge  
United States District Court

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